

Interpretation of “Not Undermine” concerning the Relationship between Area-Based Management Tools (ABMTs) under a BBNJ Instrument and Measures under Existing Mechanisms

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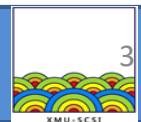


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1.Introduction

- Marine areas beyond national jurisdiction (ABNJ) cover approximately 40% of the earth's surface, 64% of the ocean surface and 95% of its volume.
- **ABMTs including MPAs** are widely recognized as a key mechanism for conserving and restoring biodiversity.
- ABMTs including MPAs are **one of the key issues under the discussions and negotiations** on an *international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (BBNJ instrument).
- Of these relevant issues, **the relationship** between ABMT-related measures under a BBNJ instrument to UNCLOS and measures under relevant existing instruments, frameworks and bodies has aroused much debate.



2. Potential Conflicts between ABMTs under a BBNJ Instrument and Measures under Relevant Instruments, Frameworks and Bodies

- Possible conflicts with ABMTs/MPAs in ABNJ that have been/would be established *by existing regional and/or sectoral bodies*.
- Possible conflicts with the *mandates and competences of other international and regional bodies*.
- Possible conflicts with the *1982 UNCLOS and its two implementation agreements* adopted in 1994 and 1995 respectively.
- possible conflicts with *other international and regional agreements*.



There are overlapping regimes that need to be harmonized.

3. The “Not Undermine” Requirement Provided by UN General Assembly Resolutions

□ UN General Assembly Resolution 69/292 (adopted on 19 Jun. 2015)

“3. Recognizes that the process indicated in paragraph 1 above *should not undermine* existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;”

□ UN General Assembly Resolution 72/249 (adopted on 24 Dec. 2017)

“6. Reaffirms that the work and results of the conference *should be fully consistent with* the provisions of the United Nations Convention on the Law of the Sea;

7. Recognizes that this process and its result *should not undermine* existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;”



A future BBNJ instrument “*should not undermine*” existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

■ Questions:

What the meaning of “not undermine”? ; How to ensure/reflect the requirement of “not undermine”?

4. The Meaning of “Not Undermine”

□ Meanings in Dictionaries

- undermine: “*to subvert or weaken* insidiously or secretly; to weaken or ruin by degrees.”
----Merriam-Webster’s Collegiate Dictionary, 1994
- undermine: “[to] *make [something] less strong or less secure than it was before*, often by a gradual process or by repeated efforts.”
----Collins (Cobuild) English Dictionary, 1995

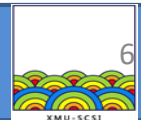
□ Not mentioned or defined in 1982 UNCLOS

□ Uses in the 1995 Fish Stocks Agreement to 1982 UNCLOS

- the word “undermine” is *mentioned 8 times in the 1995 UN Fish Stocks Agreement* , although it *is not defined* in this agreement.

Including:

- “undermine the effectiveness of [...] measures”: used for 6 times; [Arts 7(2)(a), 17(4), 18(1), 18(3)(h), 20(7), 23(3).]
- “undermine the [fish] stocks”: used for 1 time; [Art 16(2)]
- “undermine the effective implementation of this Agreement”: used for 1 time. [Art 33(2)]



❑ Uses in *2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement)*

- Art 14(4), “...This Agreement *shall neither undermine nor conflict with* the role and mandate of any existing international mechanism relating to fisheries management.”
- In this agreement, the relationship of the CAOF Agreement with other regional agreements *was addressed through three different levels*. Namely, concerning the general legal framework [Art 14(1)], concerning the rights and obligations of the parties arising from the general framework [Art 14(2)(3)], and not undermine r conflict with existing international mechanism [Art 14(4)].



- The existing treaties indicate that **the term “not undermine” has not been explicitly defined, but instead this requirement has been reflected in relevant agreements**. [eg, CAOF Agreement]

5. Approaches to Reflecting the “Not Undermine” Requirement in a Future BBNJ Instrument

5.1 General Requirement: “Not Undermine” Existing Mechanisms

- “The regulation of this Part *shall not undermine* existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.”

----*President’s aid to negotiations, 2019*

- This is consistent with UN GA resolutions 69/292 and 72/249;
- most States supported this reference/expression at BBNJ IGC-2; only differed on where this should be put (general elements section vs. each section?).
- Less likely that there will be a definition of “undermine” in this BBNJ instrument although this has been suggested by some States.



5.2 The 4-Element Approach to Reflecting the “Not Undermine” Requirement at BBNJ IGC-2: Some Preliminary Comments

□ Element 1: Promotion of *coherence and complementarity* in measures related to ABMTs, including MPAs

Three divergent issues discussed at IGC-2

➤ How should States parties promote coherence and complementarity?

View 1: through global overarching framework [G77+China, EU, African Group, Singapore, India, Australia, New Zealand...]

View 2: through the application of general principles and approaches, guidelines, standards, or the process of ABMTs/MPAs. [Norway, Japan, Korea, USA...]

Comments:

- Purpose of this element is to ensure “no undermining”, so any regulation that may lead to hierarchy is inconsistent with UNGA Resolutions, thus not acceptable.
- Global approach has its strength in ensuring coherence and complementarity.

➤ When may the measures related to ABMTs/MPAs be established?

View 1: where there is no competent global, regional or sectoral body.[Australia...]

View 2: to complement measures designed under exiting mechanisms.
[Micronesia, Argentina, Turkey, Philippines...]

View 3: merge the above two options [African Group, EU, Singapore, New Zealand...]

Comments:

- View 3 is generally reasonable as it is consistent with the “not undermine” requirement.
- “complementarity” may be examined through both the geographical scope and functional mandates of relevant bodies.



➤ The issue of “recognition”

- View 1: oppose/doubt the “recognition”. Reasons: not clear what the “recognition” might entail or imply (Norway); may be interpreted differently (Singapore). *Not acceptable if validity of other ABMTs is somehow dependent on this body.* [Australia, Singapore, Japan, Norway,...]
- View 2: ABMTs/MPAs established under existing mechanism *shall go through a process of “recognition”* by global mechanism, or other arrangement under this instrument, or be recognized automatically. [AG, EU, Argentina,...]

Comments:

- To meet/reflect the “not undermine” requirement, the use of “*recognition*” *should not create any hierarchy*, thus the “recognition” might be either clearly defined or replaced by another term (eg, consultation?).
- ABMTs/MPAs established under existing mechanisms would not be dependent on a BBNJ instrument to be valid.

□ **Element 2: Enhanced *cooperation and coordination* between relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, with regard to ABMTs, including MPAs, without prejudice to their respective mandates.**

➤ **How should this “*cooperation and coordination*” be enhanced?**

- View 1: could be enhanced *through* a coordination mechanism, cooperation and coordination in the consultation process, a working group, or coordination mechanisms at the regional level. [AG, Argentina, New Zealand, Iceland...]
- View 2: while supporting the enhancement of cooperation and coordination, *concerned about options provided in View 1*; proposed *no-text or COP* model. [USA, Norway, Japan, Russia...]

Comments:

- “cooperation and coordination” involves institutional arrangement. Existing regional and sectoral practice and relevant research reveal the strength of a global approach.
- Not undermining/superseding existing mechanisms is a key.

- ❑ **Element 3: *Respect for the rights of coastal States* over all areas under their national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone.**
- In cases where a **ABMT/MPA established under this Part falls under the national jurisdiction of a coastal State at a future point in time**, either whole or in part, that area shall be amended or cease to be in force.
 - Views: accept; [EU, Russia,...] or suggest redrafting [USA, Japan, Russia, Australia...].

Comments:

- Regarding existing practice (eg, Mediterranean sea), this approach works;
- Regarding a future BBNJ instrument, this scenario could be avoided so not necessary.
Relevant scenarios: extended CS, EEZ, disputed sovereignty.

□ **Element 4: Relationship between measures under this instrument and those established by adjacent coastal States, including *issues of compatibility*.**

- This relationship should apply the “compatibility” requirement or “due regard” obligations?
- View 1: support the “compatibility” requirement through consultations. [Russia- decisive vote by adjacent coastal States, Argentina, Philippines...]
 - View 2: support the application of “due regard” obligations; meaning of “compatibility” vague. [EU, USA, Japan,...]

Comments:

- The concept of “adjacency” is only employed in the context of fisheries and has been elaborated through the concept of “compatibility” in the context of the 1995 UNFSA [“prioritizing coastal State rights”; “creeping jurisdiction”?].
- Existing practice indicates that “due regard” is fundamental in addressing interactions between coastal States and other States.
- UNCLOS and CBD indicate that “the primary responsibility for dealing with MPAs in ABNJ rests on States [carrying out activities in ABNJ]”.

6. Concluding Remarks

- “Not Undermine” requirement in the ABMT/MPA of a BBNJ instrument context could be roughly interpreted as *“to complement but not overlap in terms of objectives and functional mandates”* rather than mere geographical coverage”.
- This requirement *could be reflected through several elements* in a future BBNJ instrument to ensure that a delicate balance reached with the adoption of the UNCLOS between relevant States would not be upset.

